



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 639 OF 2015

THE REGISTERED TRUSTEES OF SHEIKH

ZAYED BIN SULTAN AL NAHYAN.....PLAINTIFF

=VERSUS=

PELICAN ENGINEERING & CONSTRUCTION

COMPANY LTD.....1ST DEFENDANT

CHIEF LANDS REGISTRAR.....2ND DEFENDANT

THE CHAIRMAN, NATIONAL

LAND COMMISSION.....3RD DEFENDANT

NAIROBI CITY COUNTY GOVERNMENT.....4TH DEFENDANT

THE TRUSTEES, KENYA RAILWAYS STAFF

RETIREMENT BENEFITS SCHEME.....5TH DEFENDANT

**IN THE MATTER OF AN APPLICATION FOR COMMITAL FOR CONTEMPT OF COURT AND FOR SUCH OTHER OR
FURTHER ORDERS AS MAY SEEM JUST TO THE COURT**

BY

PELICAN ENGINEERING & CONSTRUCTION

COMPANY LIMITED.....APPLICANT

=VERSUS=

THE TRUSTEES KENYA RAILWAYS STAFF

RETIREMENT BENEFIT SCHEME.....1ST RESPONDENT

SIMON NYAKUNDI.....2ND RESPONDENT

CORPORATE AND PENSION TRUST

SERVICE LIMITED.3RD RESPONDENT

JABAVU VILLAGE LIMITED.....4TH RESPONDENT

WHITE LOTUS PROJECTS LIMITED.....5TH RESPONDENT

IOTA EXCAVATION AND RENTALS LIMITED...6TH RESPONDENT

CHINA STATE CONSTRUCTION CORPORATION.....7TH RESPONDENT

SKETCH STUDIO LIMITED.....8TH RESPONDENT

MATRIX INTERGRATED CONSULTANCY.....9TH RESPONDENT

TERRA CONSULT KENYA LIMITED.....10TH RESPONDENT

BECS CONSULTANCY.....11TH RESPONDENT

GRACE WANJIRU MUNGAI

W/O ALEX IKUMU GATOTO.....12TH RESPONDENT

ABDINASIR ALI HASSAN.....13TH RESPONDENT

MOHAMED SHARIFF ABDULLAHL.....14TH RESPONDENT

AMINA ZAMZAM ALI15TH RESPONDENT

POOSAPATI SITA RAMACHNDRA RAJU.....16TH RESPONDENT

MOHAMUD MAHAT NOOR.....17TH RESPONDENT

JAMES ISRAEL OLUBAYI.....18TH RESPONDENT

RULING

Background

1. Three parties in this suit; the plaintiff, the 1st defendant, and the 5th defendant, lay claim of ownership to the same piece of land, situated in Upper Hill, Nairobi City County. The plaintiff's claim of ownership is predicated on a Letter of Allotment dated 22/1/1990 and a resultant Grant registered on 28/2/1992 as Grant Number I.R 54999/1 comprising Land Reference Number 209/11522 which is said to be delineated on Survey Plan No160806 dated 26/2/1992.
2. The 1st defendant's claim of ownership is predicated on a Letter of Allotment dated 5/1/1991 and a resultant Grant registered on 6/3/2015 as Grant No IR 161414/1 comprising Land Reference Number 209/11552 delineated on Survey Plan No 162482 dated 15/2/1992. It is to be noted that whereas the land reference number for both titles is the same, the registered Deed (Survey) Plans bear different numbers.
3. The 5th defendant's claim of ownership is premised on Legal Notice No. 169 of 2006. The 5th defendant contends that the suit land was part and parcel of Land Reference Number 209/6525 measuring about 6.88 Acres, comprised in Grant No IR 20605 registered on 12/3/1965 in the name of the General Manager of the East African Railways & Harbours Administration. The said parcel of land was subsequently vested in the 5th defendant's sponsor, Kenya Railways Corporation. Through Legal Notice No 169 of September 2006, Kenya Railways Corporation vested this parcel of land [LR NO 209/6525] together with other properties in the 5th defendant as part of a settlement of the accrued pension arrears due to the 5th defendant from Kenya Railways Corporation. The 5th defendant contends that prior to that, Kenya Railways Corporation had sold a portion of Land Reference No 209/6525 to Rahimtula Trust and had surrendered the title to the said larger parcel of land to the department of lands to facilitate subdivision, resurvey and issuance of new titles. The portion sold to Rahimtula Trust was excised and Rahimtula Trust was issued with a title bearing Land Reference Number 209/11429 measuring 0.98 Hectares while the 5th defendant was issued with a title bearing LR No 209/11617 measuring 2.5 Acres. The 5th defendant contends that the remaining portion out of the original parcel (which measured 6.88 Acres as per Grant No IR 20605) remained the property of Kenya Railways Corporation although the department of lands did not issue them with a title for this remainder. They further contend that the suit land is part and parcel of the remainder [after sale to Rahimtula Trust] which was vested in the 5th defendant by dint of Legal Notice No 169 of September 2006. At this point, it would be noted that Legal Notice No 169 of 2006 makes reference to 8.69 Acres. On the other hand, Grant No 20605 in which the whole of Land Reference No 209/6525 was comprised makes reference to 6.88 Acres. This discrepancy may be of keen interest at the substantive hearing of this suit.
4. In the year 2015, the 5th defendant filed **Nairobi (Milimani) ELC Civil Suit No 302 of 2015; the Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme Vs The Registered Trustees of Sheikh Zayed Bin Sultan Al Nahyan & 3 Others**, seeking among other prayers, a revocation of the title of the plaintiff herein. The fate of that suit is not clear at this point.
5. What is clear, however, is that, subsequent to that, in the same year, the plaintiff herein, The Registered Trustees of Sheikh Sayed Bin Sultan Al Nahyan, through a plaint dated 6/7/2015, brought the present suit against the 1st, 2nd, 3rd and 4th defendants, seeking among other prayers, a declaration that the plaintiff herein is the legal owner of the suit property. Together with the plaint, the plaintiff filed a Notice of Motion dated 6/7/2015 seeking interim restraining orders.

6. Following the filing of the Application, on 21/7/2015, this court (Gacheru J), issued a preservative order framed thus:

Pending the filing of the relevant papers by the defendants, the court will issue an order for preservation of the suit property. No further dealings by any of the parties herein.

7. Subsequent to that, the 5th defendant brought a Notice of Motion dated 12/8/15 seeking to be enjoined as a party in this suit. In addition, the 5th defendant sought an order vacating the preservative order issued by Gacheru J on 21/7/15.

8. Through a Ruling dated 18/11/2015, Gacheru J granted the 5th defendant's prayer to be enjoined in the proceedings. The court however declined to vacate the preservative order issued on 21/7/2015. The court stated as follows:

On the 3rd prayer of vacating or discharging the orders issued by the court on 21st July 2015, the said order was for preservation of the suit property. There was to be no further dealings by any of the parties herein.

The said orders were prompted by the fact that both the plaintiff and 1st defendant in the instant suit were claiming ownership of the suit property. The court is yet to decide on whether to grant the injunction sought or not. However the suit property needs to be preserved. The applicants (now 5th defendants) have also claimed ownership of the said suit property. As the court waits to determine whether to grant an order of injunction or not, it is for the interest of justice and fairness to have the suit property preserved.

The court being guided by provisions of Section 1A and 3A of the Civil Procedure Act finds that the order of preservation of the suit property is proper and finds no reason to vacate the same or discharge it. Consequently this court disallows prayer No 3 of the instant Notice of motion.

9. By the time this Case File was assigned to this court in February 2017, the plaintiff's Notice of Motion dated 6/7/2015 was still pending and the preservative order issued on 21/7/2015 was still in force. On 4/4/2017, parties, with a view to fast-tracking the disposal of the main suit, recorded the following consent orders:-

“(1) By consent of the parties, the preservative order given by Judge Gacheru on 21/7/2015 shall remain in force pending further orders of the court.

(2) The plaintiff's Notice of Motion dated 6/7/15 shall be marked as spent with no orders as to costs.

(3) The defendants shall file and serve defences, bound, paginated and indexed bundles of documents and witness statements within 30 days.

(4) Mention on 29/5/2017 to confirm compliance and fix a hearing date”.

Contempt Motion

10. On 20/7/2017, through a Notice of Motion dated 19/7/2017, the 1st defendant, Pelican Engineering & Construction Limited, initiated contempt proceedings within this suit against the following 18 Respondents:-

1. *The Trustees Kenya Railways Staff Retirement Benefit Scheme*

2. *Simon Nyakundi*

3. *Corporate and Pension Trust Service Limited.*

4. *Jabavu Village Limited*

5. *White Lotus Projects Limited*

6. *Iota Excavation and Rentals Limited*

7. *China State Construction Corporation*

8. *Sketch Studio Limited*

9. *Matrix Integrated Consultancy*

10. *Terra Consult Kenya Limited*

11. *Becs Consultancy*

12. *Grace Wanjiru Mungai W/o Alex Ikumu Gatoto*

13. Abdinasir Ali Hassan

14. Mohamed Shariff Abdullahi

15. Amina Zamzam Ali

16. Poosapati Sita Ramachndra Raju

17. Mohamud Mahat Noor

18. James Israel Olubayi

11. The substantive contempt orders which the 1st defendant seeks against the 18 Respondents in the said Motion are as follows:-

4. Pending the hearing and determination of this suit herein be ordered to vacate and rescind any lease, grant, licence or other authorization granted to one Jabavu Village Limited and/or White Lotus Projects Limited or any of the Respondents herein and/or their contractors, agents, directors, associates, partners, employees or other associates to enter, occupy and/or use all that property known as LR No.209/11552 situate on Upper Hill Road, Nairobi and being the third parcel of land on the right hand side of Upper Hill Road on the approach from Haile Sellasie Avenue and the said parties to vacate the said property within 24 hours of service of this order failing which eviction to issue forthwith under the assistance of the Officer Commanding Station, Upper Hill Police Post/Station.

5. Pending the hearing and determination of this suit, the Respondents herein, or so many of them as may be found to have been directly responsible for the excavations and works on all that property known as LR No.209/11552 situate on Upper Hill Road, Nairobi and being the third parcel of land on the right hand side of Upper Hill Road on the approach from Haile Sellasie Avenue be ordered to refill the same and restore the said property, as much as is practicable, to the position it was before such excavation and works within such time as may be ordered and in default of the same the applicant be at liberty to secure due compliance with the said order at the personal cost of such respondents.

6. This Honourable Court be pleased to find that the Trustees Kenya Railways Staff Retirement Benefits Scheme, Simon Nyakundi, Corporate and pension trust service limited, Jabavu village limited, White lotus projects limited, Iota excavation and rentals limited, China state construction corporation, Sketch studio limited, Matrix integrated consultancy, Terra consult Kenya limited, Becs consultancy, Grace Wanjiru Mungai W/o Alex Ikumu Gatoto, Abdinasir Ali Hassan, Mohamed Shariff Abdullahi, Amina Zamzam Ali, Poosapati Sita Ramachndra Raju and Mohamud Mahat Noor being the 1st to 17th respondents herein, respectively, or each and all of them, are jointly and/or severally in contempt of court for disobeying and/or each and all of them, are jointly, and/or severally in contempt of court for disobeying and/or wilfully disregarding the orders and directions given herein on the 4/4/2017 and 29/5/17.

7. Accordingly, leave be granted for the committal to civil jail for a period of six (6) months of Simon Nyakunji, James Israel Olubayi, Grace Wanjiru w/o Alex Ikumu Gatoto, Abdinasir Ali Hassan, Mohamed Shariff Abdullahi, Amina Zamzam Ali, Poospati Sita Ramachndra Raju and Mohamud Mahat Noor and each and all of the said persons be additionally required to pay a fine of such amount as may be ordered by this Honorable Court for the said contempt.

8. Sequential and/or attachment do issue for the properties of Trustees Kenya Railways Staff Retirement Benefits Scheme, Simon Nyakundi, Corporate and pension trust service limited, Jabavu village limited, White lotus projects limited, Iota excavation and rentals limited, China state construction corporation, Sketch studio limited, Matrix intergrated consultancy, Terra consult Kenya limited, Becs consultancy, Grace Wanjiru Mungai W/o Alex Ikumu Gatoto, Abdinasir Ali Hassan, Mohamed Shariff Abdullahi, Amina Zamzam Ali, Poosapati Sita Ramachndra Raju and Mohamud Mahat Noor being the 1st to 17th Respondents herein, respectively, or each and all of them, and the same be attached for the amount to be determined pending the purging of their contempt of this Honorable Court in disobeying and/or wilfully disregarding the orders and directions given herein on 4/4/2017 and on 29/5/17.

9. The honourable court be pleased to issue such other or further or consequential orders as may seem just and expedient.

10. The costs of and occasioned by the contempt of court proceedings herein be taxed and met by each and all of the respondents herein jointly and/or severally and in default thereof execution to issue forthwith.

12. The said Notice of Motion dated 19/7/2017 is the subject of this Ruling. The Motion was canvassed through written and oral submissions. The gist of the Motion is that the respondents are in blatant breach and disobedience of this honourable court's orders preserving the suit property, which restrained all parties in the suit against dealing in the suit property. The 1st defendant contends that the 5th defendant and its Chief Executive Officer have purported to grant a licence or lease of the suit property to a company by the name Jabavu Village Limited (4th respondent in the contempt motion) which has in turn granted access thereto to White Lotus Projects Limited (5th respondent in the contempt motion) who are constructing a high rise building on the adjacent property.

13. The 1st defendant further contends that the 5th respondent has forcibly and in breach of the said preservatory orders moved into the suit property, destroyed the existing fence, erected a new fence joining the suit property to their adjacent property, cut all the grass and tress thereon and have commenced excavation on the suit property.

14. The Notice of Motion is supported by an affidavit sworn by Bernard Njau Mungai (Administration Manager of the 1st defendant) sworn on 19/7/17. The deponent has deposed that the 1st respondent in the contempt motion, The Trustees of Kenya Railways Staff Retirement

Benefits Scheme, is a body corporate run and headed by a corporate trustee by the name Corporate & Pension Trust Services Ltd (3rd respondent in the motion) whose directors are the 2nd and 18 respondents in the motion. The deponent further contends that the 2nd respondent, Simon Nyakundi, is the one who has invited or authorized the developers of the adjacent property to invade the suit property.

Opposition to the Motion

15. The 5th defendant (1st respondent in the contempt motion) has opposed the application through a replying affidavit sworn by its Chief Executive Officer, Simon Nyakundi (2nd respondent in the contempt motion). He contends that the 5th defendant is the bonafide owner of the suit property pursuant to Legal Notice No 169 of 2006. He further deposes that the suit property is a source of income for the 5th defendant. He contends that the 5th defendant has been leasing the suit property for the purpose of generating income to pay its pensioners. He asserts that the latest lease was by way of temporary occupation licence granted to Jabavu Village Limited on 22/3/2017 and the said Jabavu Village took possession of the suit property and is operating from there.

16. Mr. Nyakundi further deposes that the orders issued by the court on 21/7/2015 were not directed at the 5th defendant. Lastly, he deposes that the use of the suit property, including the erection of structures thereon by the licensee, do not in any way damage, alter or waste the character of the suit property.

17. The 2nd, 3rd, and 18th respondents in the contempt motion oppose that application on uniform grounds of opposition dated 19/9/2017 and filed on 25/9/2017. They contend that: (i) they are not parties to this suit; (ii) they were never served with pleadings and or the material court order, save as advertised in the Newspaper; (iii) the application is hollow devoid of merit and an abuse of the court process; (iv) the application does not disclose a cause of action against them; and (v) that this court lacks jurisdiction to determine the issues raised in the application.

18. The 4th, 13th, 15th, and 16th respondents in the contempt motion oppose the application through a replying affidavit sworn by Abdulkadir Ahmed Hussein on 29/11/2017. He deposes that they were not aware of any court order and they were not parties to the order issued on 21/7/2017. He further deposes that the subject order was directed against the parties to the suit and not to them. Mr. Hussein further deposes that the said respondents were granted a lease on Land Reference Number 209/6525 for valuable consideration by the 1st defendant and they are using the suit property as a storage of their equipment and materials that are used to develop the adjacent property. Mr. Hussein confirms that he is aware that the ownership of the suit property is contested.

Submissions

19. Mr. Ochieng Oduol, Counsel for the 1st defendant (applicant) through written and oral submissions, submitted that the 1st and 2nd respondents have purported to lease out the suit property to the 4th and 5th respondents who have in turn engaged the services of the 6th to 11th respondents who are contractors and consultants and who are actively engaged in construction works on the adjacent property. He contended that the lease was issued in May 2017 in contempt of the order of Gacheru J. He added that the contempt has continued despite service of the order upon all the respondents through their advocates and also through a notice in the Newspaper on 4/9/2017. He urged the court to reign in on the impunity exhibited by the respondents, more so the 1st respondent. Mr. Ochieng further submitted that the constant and sustained disobedience to the court orders by the respondents has brought the authority and standing of the court into disrepute. He further submitted that a court order is not a mere suggestion or opinion; it is a directive issued after much circumspection and it must be complied with in the interest of all. He argued that a contrary suggestion would lead to chaos and anarchy. He relied on the case of **(i) Teachers Service Commission Vs Kenya National Union of Teachers and 2 Others [2013] eKLR**; and **(ii) Africa Management Communication International Ltd. Vs Joseph Mathenge Mugo and another [2013] eKLR**.

20. On whether the respondents should have audience of the court before purging the alleged contempt, Mr. Ochieng submitted that the nature of the suit property has been changed drastically by the respondents' actions. He urged the court to order the respondents to purge the contempt and restore the property to its initial state before they can be heard in the suit. He relied on **(i) Econet Wireless Kenya Limited vs Minister for Information & Communication of Kenya & Another (2005) eKLR**; and **(ii) Hadkison Vs Hadkison (1952) and All ER 567**.

21. Mr. Milimo, Counsel for the 1st, 2nd, 3rd, 4th and 18th respondents submitted that the material orders were specifically directed at the parties to the suit at the time they were issued. He contended that the 5th defendant was not a party to the suit at the time the orders were issued. He added that the parties who are bound by the orders are the plaintiff and the 1st to the 4th defendants.

22. Secondly, Mr. Milimo submitted that the subject court orders are subject to varied interpretation by the parties reading them. He added that because the orders did not order a specific action to be done or not to be done, the orders cannot be the basis of contempt proceedings. Counsel further submitted that when the 5th defendant issued the licence to Jabavu Village Limited on 22/3/2017, the court orders in place did not relate to the 5th defendant and any subsequent order issued after the issuance of the lease was overtaken by events.

23. Mr. Milimo further submitted that prayers 2, 3, 4 and 5 of the application are mandatory injunctive prayers and the same cannot be issued in the absence of a counterclaim by the applicant.

24. Mr. Muganda, Counsel for the 4th – 13th and 15th -17th respondents submitted that his clients are enjoined in the contempt proceedings by dint of contractual rights granted by the 5th defendant. He added that they were not parties to the orders issued by Gacheru J. He added that no penal notice had been served on them. He further submitted that the excavation was done for the purpose of strengthening the pillars and it was thereafter filled. He also submitted that the 6th – 17th respondents are consultants undertaking professional work on an adjacent piece of land.

Determination

25. I have considered the tenor and import of the Notice of Motion dated 19/7/2017. I have also considered the affidavits and rival submissions by counsel for the parties. The application raises four key questions. The first question is whether the preservative order issued by Gacheru J on 21/7/2015 bound all the parties to the present contempt motion. The second question is whether all or any of the parties to the contempt motion were aware of the preservative order at the time of the alleged contempt. The third question is whether any of the respondents in the contempt motion engaged in conduct that amount to contempt of court within the framework of Section 4 of the Contempt of Court Act. The last question is whether the licence issued on 22/3/17 by the 5th defendant through the 2nd respondent to the 4th respondent conferred any valid contractual rights in relation to the suit property.

26. Before I pronounce myself on the above questions, I would like to make some observations on Kenya's legal framework on contempt. Prior to 2016, the superior courts' jurisdiction to punish for contempt was derived from Section 5 of the Judicature Act (Cap 8). Under this law, superior courts' jurisdiction to punish for contempt was exercised in accordance with the legal framework and practice and jurisprudential principles governing exercise of similar jurisdiction by the High Court of Justice in England. Invariably, by dint of this law, the statutory framework and case law applicable to contempt proceedings in the High Court of Justice in England applied to contempt proceedings in the superior courts in Kenya.

27. Through the Contempt of Court Act, Act No. 56 of 2016, Parliament promulgated an elaborate substantive and procedural legal framework on contempt proceedings. To this extent, Kenya's courts are no longer bound by the statutes, practice and English jurisprudence guiding contempt of court proceedings in the High Court of Justice in England.

28. The objective of the Contempt of Court Act, 2016 is spelt out in Section 3 of the Act thus:-

3. Objectives of this Act

The objectives of this Act are to:-

- (a) uphold the dignity and authority of court;
- (b) ensure compliance with the directions of the court;
- (c) ensure the observance and respect of due process of law;
- (d) preserve an effective and impartial system of justice; and
- (e) maintain public confidence in the administration of justice as administered by court.

29. Civil contempt is defined in Section 4 of the Act as:-

willful disobedience of any judgment, decree, direction, order, or other process of a court or wilful breach of an undertaking given to a court.

30. The contempt motion under consideration was brought under Sections 3, 4, 5 (b), 28 and 24(2) of the Contempt of Court Act, 2016; Sections 1A, 1B, 3A and 63 of the Civil Procedure Act 2010, and Order 40 rule 3 and 10 of the Civil Procedure Rules 2010.

31. I now turn to the first issue, which is whether the preservative order issued by Gacheru J on 21/7/2015 bound all the parties to the present contempt motion. It is not disputed that the order which is captured verbatim in paragraph 6 of this ruling was indeed issued by Gacheru J. It is on record that subsequent to that, the 5th defendant brought an application seeking to be enjoined in this suit as a party. In the same application, the 5th defendant sought a vacation of this same preservative order issued on 21/7/15. In a ruling delivered on 18/11/2015, Gacheru J allowed joinder of the 5th defendant and reaffirmed that the preservative order would remain in force. It is not in doubt that all parties to the suit were once more, through the ruling of 18/11/15, directed not to deal in the suit property. The court reaffirmed the operativeness of that preservative order after enjoining the 5th defendant as at that date. For avoidance of doubt the relevant part of the ruling of the court is reproduced below:-

“On the 3rd prayer of vacating or discharging the orders issued by the court on 21st July 2015, the said order was for preservation of the suit property. There was to be no further dealings by any of the parties herein.

The said orders were prompted by the fact that both the plaintiff and 1st defendant in the instant suit were claiming ownership of the suit property. The court is yet to decide on whether to grant the injunction sought or not. However the suit property needs to be preserved. The applicants (**now 5th defendants**) have also claimed ownership of the said suit property. As the court waits to determine whether to grant an order of injunction or not, it is for the interest of justice and fairness to have the suit property preserved.

The court being guided by provisions of Section 1A and 3A of the Civil Procedure Act finds that the order of preservation of the suit property is proper and finds no reason to vacate the same or discharge it. Consequently this court disallows prayer No 3 of the instant Notice of motion.”

32. It is clear from the foregoing that the order made by the court on 21/7/2015 was directed to the parties to the suit. It is also clear that the order was reaffirmed on 18/11/15 after the 5th defendant became a party to the suit. In light of this, it is not correct, in my view, to contend that the 5th defendant was not bound by the order because it was not a party to the suit when the order was first issued.

33. Even if my interpretation were to be wrong, it would be noted that Section 4(2) of the Contempt of Court Act has broadened the scope of persons who are bound by court orders. Under Section 4(2) of the Contempt of Court Act, contempt is deemed to have been committed in any case if an act is willfully committed to interfere, obstruct or interrupt the due process of the administration of justice in relation to any court, or to lower the authority of a court, or to scandalize a judge or judicial officer in relation to any proceedings before the court, in any other manner.

34. The legal ramifications of Section 4(2) in relation to the present contempt motion is that it places a duty on all persons, be they parties to the suit or not, to refrain from any acts that interferes obstructs or interrupts the due process of the court or lowers the authority of the court.

35. My interpretation of the above framework is that even if an order is directed to parties to a suit and by implication, to their agents, any wilful act by a non-party that interferes, obstructs or interrupts the due process of the administration of justice in relation to any court, or lowers the authority of the court, or scandalizes a judge or judicial officer in relation to any proceeding before a court, constitutes contempt of court. The baseline, however, is whether the non-party alleged to have committed the offensive act was aware of the order or court matter in which contempt is alleged.

36. From the foregoing analysis, it follows that the 5th defendant and servants of the 5th defendant were directly bound by the order of the court made on 21/7/15. Similarly, by dint of Section 4(2) of the Contempt of Court Act, the respondents who are not substantive parties to this suit were bound by the preservative order upon service of the order on them effective from the date the Contempt of Court Act came into force.

37. The second issue is whether all or any of the respondents was aware of the existence of the preservative order. It is not in dispute that as at 22/3/17 all parties to this suit were aware of the preservative order issued by the court on 21/7/15. Indeed, the only respondents who have denied being aware of the preservative order as at the time the motion was brought are the respondents who are not substantive parties to the suit. The key act complained of is the issuance of a licence by the 5th defendant through its Chief Executive Officer, to the 4th respondent in the contempt motion. It is the issuance of the licence which culminated in the subsequent take-over of the suit property by the 4th respondent.

38. The applicant has not presented to the court evidence to prove that the rest of the respondents were aware of the order as at 22/3/17 when the licence was issued. In the absence of that crucial evidence, I have no basis to find that all the respondents were aware of the order. The evidence before court demonstrates that the 1st and 2nd respondents in the contempt motion were aware of the preservative order. They do not contest their knowledge of the preservative order. They however contend that they were not bound by the order because they were not party to the suit when the order was first issued on 21/7/2015.

39. The third question is whether any of the respondents has engaged in conduct which amount to contempt. The subject preservative order forbade further dealings in the suit property by the parties. While that order subsisted, the 5th defendant, through its Chief Executive Officer (the 2nd respondent in the contempt motion), issued a licence to the 4th respondent, effectively purporting to hand over the suit property to the 4th respondent. This led to the occupation of the suit property by some of the respondents in the contempt motion. Issuance of the licence to the 4th respondent was clearly a dealing in the suit property. Put differently, it was an act which the preservative order forbade. The court therefore finds that the 5th defendant and its Chief Executive Officer (the 2nd respondent in the contempt motion) engaged in an act that constitute contempt. That act was the issuance of the licence to the 4th respondent. The court has no evidence that other respondents in the contempt motion were aware of the conservatory orders at the material time and engaged in acts of contempt as defined in Section 4 of the Contempt of Court Act.

40. The last question is whether the licence issued on 22/3/17 by the 5th defendant to the 4th respondent conferred any valid contractual rights in relation to the suit property. The philosophy which informed the enactment of the Contempt of Court Act is clearly spelt out in Section 3 of the Act. In summary, that philosophy is the foundation of the rule of law. In the present suit, the 5th defendant and its Chief Executive Officer were bound by the preservative order issued on 21/7/15. In breach of that order, they purported to execute a licence which purported to hand over the suit property to the 4th respondent. In law, that act was an illegality and remains an illegality. It is therefore the court's finding that, to the extent that the licence issued to the 4th respondent by the 5th defendant through its Chief Executive Officer on 22/3/17 was done in contempt of court, it did not confer any recognized contractual rights upon the 4th respondent. All resultant interests and purported rights accruing from that act of blatant contempt of court are similarly nullities in law. In this regard, the court fully embraces the below dictum in **Clarke and Others Vs Chadburn & Others (1985) ALL ER (PC) 211:**

“I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed. Willful disobedience to an order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal. If by such disobedience the persons enjoined claim that they have validly effected some change in the rights and liabilities of others, I cannot see why it should be said that although they are liable to penalties for contempt of court for doing what they did, nevertheless those acts were validly done.... But the legal consequences of what has been done in breach of the Law may plainly be very much affected by illegality. It seems to me on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted with illegality that produced them...even if the defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it”

41. Before I summarize the court's findings and give disposal orders, I would like to observe that I have carefully reflected on the wordings of the prayers sought in the Notice of Motion dated 19/7/17. Some of those prayers are in essence prayers for mandatory injunctive orders. I would not grant them as framed in this contempt motion. I would instead focus on the enforcement of the preservative order issued by Gacheru J on 21/7/15, and extended by consent of the parties on 4/4/17 to the conclusion and determination of this suit.

42. Secondly, there is need to focus on substantive disposal of the main suit. I would direct all the parties to file single bundles of pleadings, witness statements and evidentiary documents within 30 days. Each bundle will be bound, paginated and indexed appropriately. Parties will also frame and file a joint summary of statement of key issues within 30 days.

Summary of Findings

43. In summary, the court's findings on the four issues in this suit are that:-

(a) The 5th defendant, the Trustees of Kenya Railways Staff Retirement Benefits Scheme, together with the Chief Executive Officer of the 5th Defendant, Simon Nyakundi (the 2nd respondent in the contempt motion) committed an act of contempt of court by issuing a lease by way of temporary licence to Jabavu Village Limited (4th respondent) on 22/3/2017 during the subsistence of the preservative order issued by this court (Gacheru J) on 21/7/2015. They are accordingly found to be guilty of Contempt of court as defined under Section 4 of the Contempt of Court Act.

(b) The lease by way of temporary occupation licence in relation to the suit property, issued by the 5th defendant to Jabavu Village Limited in contempt of court did not confer any recognized legal right upon the direct and indirect recipients of the illegal licence together with all those claiming interest pursuant to the illegal licence.

(c) The existing preservative order binds parties to this suit and it also binds all other persons purporting to deal in the suit property in contravention of the order.

(d) The rest of the respondents are not guilty of contempt because evidence was not tendered to demonstrate that they were aware of the preservative order as at 22/3/2017 when the alleged contempt was committed.

Disposal and Directions

44. Having made the above findings, I make the following directions in tandem with the framework in Sections 3 and 29 and all other relevant provisions of the Contempt of Court Act, 2016:-

(a) The Trustees of Kenya Railways Staff Retirement Benefits Scheme (5th defendant) and the Chief Executive Officer of the Scheme (Simon Nyakundi) shall attend court in person on Friday 23/2/2018 at 11:00 am to mitigate before punishment is pronounced within the framework of the Contempt of Court Act.

(b) The 5th defendant and the said Simon Nyakundi are directed to file affidavits within five (5) days setting out the measures taken to purge the contempt.

(c) All the respondents and any other person occupying the suit property in contravention of the preservative order are directed to vacate the suit property within two days. In default, the Police Commander in Charge of Nairobi County shall cause the preservative order to be enforced through forceful eviction at the instance of the 1st defendant.

(d) Costs of the contempt motion are awarded to the 1st defendant (applicant) against the 5th defendant and the 2nd respondent in the contempt motion.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF FEBRUARY 2018.

.....

B M EBOSO

JUDGE

In the presence of:-

Mr. Sumba for the plaintiff

Mrs Oduor holding brief for Ochieng for 1st Defendant

Mr. Kamau for the 2nd defendant

Mr. Muganda for the 4th-17th Respondents (except the 4th defendant)

Mr. Asena holding brief for Mr. Milimo for the 2nd, 3rd and 5th Respondents

Halima-Court clerk